



FEDERAL TRADE COMMISSION

[File No. 211 0140]

JAB/SAGE Veterinary; Analysis of Agreement Containing Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Please write: “JAB/SAGE Veterinary; File No. 211 0140” on your comment and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Mike Barnett (202-326-2362), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Website at this web address: <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “JAB/SAGE Veterinary; File No. 211 0140” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Due to protective actions in response to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you prefer to file your comment on paper, write “JAB/SAGE Veterinary; File No. 211 0140” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment

should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on <https://www.regulations.gov> – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <https://www.ftc.gov> to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it

receives on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Agreement Containing Consent Orders to Aid Public Comment

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) with JAB Consumer Partners SCA SICAR (“JAB”), the owner of Compassion-First Pet Hospitals and NVA Parent Inc. (collectively, “Compassion-First/NVA”), and SAGE Veterinary Partners, LLC (“SAGE”), which is designed to remedy the anticompetitive effects that would result from Compassion First/NVA’s proposed acquisition of SAGE.

Pursuant to an Equity Purchase Agreement dated June 14, 2021, Compassion-First/NVA proposes to acquire SAGE for approximately \$1.1 billion (the “Acquisition”). Both parties provide specialty and emergency veterinary services in clinics located in the United States. The Commission alleges in its Complaint that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 8, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the markets for certain specialty and emergency veterinary services in three different localities in the United States. The Consent Agreement, which contains the proposed Decision and Order (“D&O”) and Order to Maintain Assets, will remedy the alleged violations by preserving the competition that would otherwise be eliminated by the Acquisition. Specifically, under the terms of the D&O, Compassion-First/NVA is required to divest six clinics to United Veterinary Care, LLC (“UVC”), an operator of specialty and emergency veterinary clinics elsewhere in the country. In order to protect robust future competition in markets trending towards increased consolidation, including

due to acquisitions by JAB that may or may not be reportable under the Hart-Scott-Rodino Premerger Notification Act (“HSR”), the D&O provides for (1) a statewide prior approval by the parties in Texas and California for acquisitions proximate to existing and future NVA emergency and specialty clinics, and (2) a nationwide prior notice for proposed acquisitions proximate to existing and future NVA emergency and specialty clinics.

The Consent Agreement with the proposed D&O and the Order to Maintain Assets has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the D&O as well as any comments received, and decide whether it should withdraw, modify, or make the D&O final. The Commission is issuing the Order to Maintain Assets when the Consent Agreement is placed on the public record.

II. The Relevant Markets and Market Structures

The relevant lines of commerce in which to analyze the Acquisition are individual specialty veterinary services and emergency veterinary services. Specialty veterinary services are required in cases where a general practitioner veterinarian does not have the expertise or equipment necessary to treat the sick or injured animal. General practitioner veterinarians commonly refer such cases to a specialist, typically a doctor of veterinary medicine who is board-certified in the relevant specialty. Individual veterinary specialties include internal medicine, neurology, medical oncology, critical care, ophthalmology, and surgery. Emergency veterinary services are those used in acute situations where a general practice veterinarian is not available or, in some cases, not trained or equipped to treat the patient’s medical problem.

The relevant areas for the provision of specialty and emergency veterinary services are local in nature, delineated by the distance and time that pet owners travel to

receive treatment. The distance and time customers travel for specialty services are highly dependent on local factors, such as the proximity of a clinic offering the required specialty service, appointment availability, population density, demographics, traffic patterns, or specific local geographic impediments like large bodies of water or other geographic impediments.

The Acquisition is likely to result in consumer harm in markets for the provision of the following services in the following localities:

- a. internal medicine, neurology, medical oncology, critical care, and surgery veterinary specialty services and emergency veterinary services in and around Austin, Texas;
- b. internal medicine, neurology, ophthalmology, and surgery veterinary specialty services and emergency veterinary services in and around San Francisco, California; and
- c. internal medicine, medical oncology, and surgery veterinary specialty services in addition to emergency veterinary services in the area in and between Oakland, Berkeley, and Concord, California.

All of these relevant markets are currently highly concentrated, and the Acquisition would substantially increase concentration in each market. In some cases, the combined firm would be the only provider following the transaction. In other markets, consumers would only have one remaining alternative to the combined firm following the transaction.

III. Entry

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. For *de novo* entrants, obtaining financing to build a new specialty or emergency veterinary facility and acquiring or leasing necessary equipment can be

expensive and time consuming. The investment is risky for specialists that do not have established practices and bases of referrals in the area. Further, to become a licensed veterinary specialist requires extensive education and training, significantly beyond that required to become a general practitioner veterinarian. Consequently, veterinary specialists are often in short supply, and recruiting them to move to a new area frequently takes more than two years, making timely expansion by existing specialty clinics particularly difficult.

IV. Effects of the Acquisition

The Acquisition, if consummated, may substantially lessen competition in each of the relevant markets by eliminating close, head-to-head competition between Compassion-First/NVA and SAGE for the provision of specialty and emergency veterinary services. In some markets, the Acquisition will result in a merger to monopoly. The Acquisition increases the likelihood that Compassion First will unilaterally exercise market power and cause customers to pay higher prices for, or receive lower quality, relevant services.

V. The Proposed Decision and Order

The proposed D&O remedies the Acquisition's anticompetitive effects in each market by requiring the parties to divest six facilities¹ to UVC. The divestitures will preserve competition between the divested clinics and the combined firm's clinics. UVC is a qualified acquirer of the divested assets because it has experience acquiring, integrating, and operating specialty and emergency veterinary clinics. UVC does not currently operate or have plans to operate any specialty and emergency veterinary clinics in the relevant markets.

¹ The divested clinics include (1) SAGE's Central Texas Veterinary Specialty & Emergency Hospital (North, South, and Round Rock facilities) in Austin, Texas; and (2) Compassion-First/NVA's North Peninsula Veterinary Emergency Clinic (San Mateo), PETS Referral Center (Berkeley), and Solano-Napa Pet Emergency Clinic (Fairfield) in and around San Francisco, Berkeley, Oakland, and Concord, California. The divestitures include all assets, including equipment and intellectual property, necessary to compete effectively in each relevant market.

The D&O requires the divestiture of all regulatory permits and approvals, confidential business information, including customer information, and other assets associated with providing specialty and emergency veterinary care at the divested clinics. To ensure the divestiture is successful, the D&O also requires Compassion-First/NVA and SAGE to secure all third-party consents, assignments, releases, and waivers necessary to conduct business at the divested clinics.

The D&O also requires Compassion-First/NVA and SAGE to provide reasonable financial incentives to certain employees to encourage them to stay in their current positions. Such incentives may include guaranteed retention bonuses for specialty veterinarians at divestiture clinics. These incentives will encourage veterinarians to continue working at the divestiture clinics, which will ensure that UVC is able to continue operating the clinics in a competitive manner.

Finally, the D&O contains other provisions to ensure that the divestitures are successful. For example, Compassion-First/NVA will be required to provide transitional services for a period of up to one year to ensure UVC continues to operate the divested clinics effectively as it implements its own quality care, billing, and supply systems.

Additionally, because of the growing trend towards consolidation in specialty and emergency veterinary services markets across the country, as well as the likelihood of future acquisitions by JAB in these markets, many of which may be non-HSR reportable, the D&O includes (1) a statewide prior approval by the parties in Texas and California for acquisitions proximate to existing and future NVA emergency and specialty clinics, and (2) a nationwide prior notice for proposed acquisitions proximate to existing and future NVA emergency and specialty clinics. These provisions are effective for ten years. UVC will also be required to obtain prior approval from the Commission before transferring any of the divested assets to any buyer for a full ten years after UVC acquires

the divestiture assets, except in the case of a sale of all or substantially all of UVC's business.

The Commission will appoint Dr. Michael Cavanaugh, DVM, to act as an independent Monitor to oversee the Respondents' compliance with the requirements of the Order, and to keep the Commission informed about the status of the transfer of the divested clinics to UVC. The D&O requires Compassion-First/NVA and SAGE to divest the clinics no later than ten business days after the consummation of the Acquisition.

The purpose of this analysis is to facilitate public comment on the Consent Agreement. It is not intended to constitute an official interpretation of the Consent Agreement or to modify its terms in any way.

By direction of the Commission.

April J. Tabor,

Secretary.

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly

Slaughter and Commissioner Alvaro M. Bedoya

In June 2021, JAB Consumer Partners SCA SICAR ("JAB") proposed to buy SAGE Veterinary Partners, LLC ("SAGE"). JAB is a \$55 billion private equity fund whose investments span a host of consumer-facing businesses, from Keurig, Dr. Pepper, and Panera Bread to Krispy Kreme and Bally.¹ In recent years, JAB has expanded into pet care and pet health services. JAB's proposed transaction here would combine its existing holdings of Compassion-First Pet Hospitals and National Veterinary Associates ("NVA") with SAGE to form an entity that controls nearly 100 specialty and emergency clinics throughout the country. After conducting a thorough investigation here, the Commission determined it had reason to believe this deal—JAB's proposed acquisition

¹ JAB HOLDING CO., ANNUAL REPORT, at 4 (2021), https://www.jabholco.com/documents/2/JAB_Holding_Company_S.%C3%A0.r.l.-Annual_Report_2021.pdf.

of SAGE—was illegal, alleging in its complaint the deal would have enabled the firm to establish a dominant position in key markets for specialty and emergency veterinary services in California and Texas.

This is not the first time that JAB and its entities have proposed a deal the Commission alleged was unlawful. In 2020, the FTC brought an action against an earlier acquisition by JAB’s entities when JAB first acquired NVA.² In the complaint issued in that action, the FTC alleged that JAB’s combined ownership of Compassion-First Pet and NVA violated the antitrust laws and ordered JAB to divest three clinics. The entities before us have repeatedly proposed acquisitions that the Commission has had reason to believe would violate the antitrust laws.

As is routine in Commission actions, the FTC’s proposed relief would require a host of divestitures in both states. Critically, however, the proposed order here goes further, addressing not only the allegedly unlawful aspects of this specific acquisition but also establishing key safeguards against future dealmaking that may also prove unlawful. These extra protections are warranted given that this is the second Commission consent order against JAB, the rapid pace of JAB/NVA’s ongoing acquisitions of veterinary clinics throughout the country, and the ongoing consolidation in the industry.³

Because the deal may illegally lessen competition in three local markets in California and Texas—in and around Austin, Texas; San Francisco, California; and the East Bay—the FTC’s proposed order would require JAB to divest clinics in these

² Press Release, Fed. Trade Comm’n, FTC Requires Veterinary Service Providers Compassion First and National Veterinary Associates to Divest Assets in Three Local Markets (Feb. 14, 2020), <https://www.ftc.gov/newsevents/news/press-releases/2020/02/ftc-requires-veterinary-service-providers-compassion-first-national-veterinaryassociates-divest>.

³ Ross Kelly, Pandemic Hastens Ongoing Trend in Veterinary Consolidation, VINNEWS (Dec. 30, 2021) (“Frenetic merger activity among veterinary hospitals in 2021 has lifted the market share of corporate consolidators in the United States to close to 50% of all companion animal practice revenue by at least one estimate, as the pandemic spurs demand for pet-care services.”), <https://news.vin.com/default.aspx?pid=210&Id=10652228>. This rapid consolidation is happening worldwide and gaining the attention of antitrust enforcers in other countries, too. Ross Kelly, Competition Watchdog Bares Teeth Again in Veterinary Realm, VINNEWS (May 4, 2022), <https://news.vin.com/default.aspx?pid=210&catId=620&Id=10922952> (noting recent U.K. Competition and Markets Authority challenges to veterinary mergers there).

markets. This type of relief is a staple of the FTC's merger enforcement program: the agency identifies specific local markets where the merging parties have overlapping assets and where the deal would therefore most directly reduce competition, and it requires the merging companies to divest those overlapping assets to a separate buyer.

This proposed order, however, has two additional key protections. First, if JAB seeks to buy a specialty or emergency veterinary clinic located within 25 miles of any JAB clinic anywhere in California or Texas in the next 10 years, JAB will first have to seek the FTC's affirmative approval for the purchase. By covering *all* future acquisitions within a short driving distance of clinics that JAB already owns in California and Texas, the order establishes heightened protections that extend beyond the specific local markets at issue in this transaction. Moreover, the heightened protections will cover not just overlaps with clinics that JAB owns today, but also with any clinics that JAB subsequently owns in California and Texas—a feature of the order that helps future-proof the relief.

Second, the order will require JAB to provide 30-day advance written notice before JAB (including its relevant operating companies, Compassion-First Pet Hospitals and National Veterinary Associates) attempts to acquire a specialty or emergency veterinary clinic within 25 miles of a JAB clinic *anywhere* in the United States that JAB owns now or in the future. This provision—the first of its kind in a Commission order—ensures that the FTC will have advance notice of any unreported purchases that would ordinarily escape our review, providing the agency with the opportunity to investigate those transactions before they are consummated.

These prior approval and nationwide prior notice provisions are one way that the FTC can more closely monitor the potentially unlawful dealmaking activities of companies like JAB/NVA that have repeatedly attempted acquisitions the Commission alleged were unlawful. As we explained last year when we reinitiated the agency's use of

prior approval and prior notice, the Commission must use all of its tools and authorities to protect Americans from potentially unlawful deals—and prior approval provisions in particular can help deter anticompetitive deals and conserve scarce FTC resources.⁴ Indeed, the prior notice provision in the earlier order involving JAB has had a beneficial effect. And just recently, for example, the FTC conditioned a merger in gasoline markets, in which one of the parties explicitly sought to “try to take over” the Utah gasoline marketplace, with a prior approval requirement designed to thwart any such future efforts by the parties to acquire market power and raise gas prices for the America public.⁵

Provisions like the ones in this matter will also allow the FTC to better address stealth roll-ups by private equity firms like JAB/NVA and serial acquisitions by other corporations. Antitrust enforcers must be attentive to how private equity firms’ business models may in some instances distort incentives in ways that strip productive capacity, degrade the quality of goods and services, and hinder competition.⁶ Private equity firms’ playbook for purchasing or investing in companies can include tactics such as leveraged buyouts, which saddle businesses with debt and shift the burden of financial risk in ways that can undermine long-term health and competitive viability.⁷ While private equity firms can support capacity expansion and upgrades, firms that seek to strip and flip assets over a relatively short period of time are focused on increasing margins over the short-term, which can incentivize unfair or deceptive practices and the hollowing out of productive capacity. Meanwhile, serial acquisitions or “buy-and-buy” tactics can be used by private equity firms and other corporations to roll up sectors, enabling them to accrue

⁴ Fed. Trade Comm’n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders, https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

⁵ Press Release, Fed. Trade Comm’n, FTC Requires ENCAP to Sell Off EP Energy Corp.’s Entire Utah Oil Business amid Concerns that Deal would Increase Pain at the Pump (Mar. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-requires-encap-sell-ep-energy-corps-entire-utah-oil-business-amid-concerns-deal-would-increase>.

⁶ See, e.g., Eileen Appelbaum & Rosemary Batt, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET (2014).

⁷ *Id.*

market power and reduce incentives to compete, potentially leading to increased prices and degraded quality.⁸

Private equity firms have been particularly active in health care, including anesthesiology, emergency medicine, hospice care, air ambulances, and opioid treatment centers. A focus on short-term profits in the health care context can incentivize practices that may reduce quality of care, increase costs for patients and payors, and generate appalling patient outcomes.⁹ Research and reporting suggests these effects are especially pronounced in specialty practices, such as elder care and disability care facilities.

Research has shown that private equity ownership of elder care facilities is correlated with increased deaths at those nursing homes, potentially owing to cost-cutting measures like staffing reductions.¹⁰ In another case, as one firm consolidated ownership of group homes for people with disabilities, media reporting revealed repeated failed inspections, overworked staff, and even deaths.¹¹

Commissioners Phillips and Wilson take issue with the scope of the prior approval and prior notice in our proposed order, arguing that these heightened protections are not warranted because this acquisition by JAB raises no special concern, and that consolidation at a national level is “irrelevant” and “not inherently concerning.”¹² But

⁸ Statement of Commissioner Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress (July 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

⁹ Richard M. Scheffler et al., *Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk*, PETRIS CTR. ON HEALTH CARE MKTS. AND CONSUMER WELFARE 2 (May 18, 2021), <https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf>. See also Melea Atkins, *The Impact of Private Equity on Nursing Home Care: Recommendations for Policymakers*, ROOSEVELT INST. 2 (Apr. 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI_NursingHomesandPE_IssueBrief_202104.pdf.

¹⁰ Atul Gupta et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 28474, 2021), https://www.nber.org/system/files/working_papers/w28474/w28474.pdf.

¹¹ Kendall Taggart et al., *The Private Equity Giant KKR Bought Hundreds of Homes for People With Disabilities. Some Vulnerable Residents Suffered Abuse And Neglect.*, BUZZFEED NEWS (Apr. 25, 2022), <https://www.buzzfeednews.com/article/kendalltaggart/kkr-brightspring-disability-private-equity-abuse>.

¹² Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC (Comm’n File No. 2110140) (June 9, 2022).

this critique is belied by both market realities and prevailing law. For one, JAB has been rapidly acquiring veterinary clinics throughout the country, and it would be unwise for enforcers to ignore how private equity funds in particular can be incentivized to engage in roll-up strategies. The law also grants the FTC discretion to order fencing-in relief, particularly when confronting a repeat offender.¹³ Moreover, the statement that consolidation at a national level should play no role in our analysis is also at odds with governing Supreme Court precedent, which states that assessing general industry trends is a basic component of merger analysis.¹⁴ Ignoring this mandate raises rule of law concerns.

Strategic use of prior notice and prior approval provisions is one way that the Commission can better track and prevent unlawful acquisitions by private equity firms and other corporations. Our revision of the merger guidelines provides an additional opportunity to ensure our tools reflect current market realities, including the expanding role of private equity in our economy.¹⁵ In the meantime, we will continue to use our existing authorities to fully protect Americans from unlawful transactions.

¹³ *Telebrands Corp. v. F.T.C.*, 457 F.3d 354, 358 (4th Cir. 2006) (noting that evidence of prior violations supports stronger relief). FTC orders “may prohibit not only the further use of the precise practice found to have existed in the past, but also, the future use of related and similar practices.” *Carter Prods., Inc. v. F.T.C.*, 323 F.2d 523, 532-33 (5th Cir. 1963) (internal quotation marks and citation omitted). The Commission has wide discretion to fashion a remedy appropriate to the unlawful practices found. *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 612-13 (1946); accord *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 726 (1948); *Carter Prods., Inc. v. F.T.C.*, 323 F.2d 523, 532-33 (5th Cir. 1963).

¹⁴ *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 322 (1962) (“Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is, whether the consolidation was to take place in an industry that was fragmented, rather than concentrated, that had seen a recent trend toward domination by a few leaders, or had remained fairly consistent in its distribution of market shares among the participating companies ... all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.”). *See id.* at 332-33 (“Another important factor to consider is the trend toward concentration in the industry... [R]emaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly.”). *Id.* at 344-45 (“Other factors to be considered in evaluating the probable effects of a merger in the relevant market lend additional support to the District Court’s conclusion that this merger may substantially lessen competition. One such factor is the history of tendency toward concentration in the industry.”).

¹⁵ Press Release, Fed. Trade Comm’n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>. *See also* Regulations.gov, Request for Information on Merger Enforcement, FTC-2022-0003 (Jan. 18, 2022), <https://www.regulations.gov/document/FTC-2022-0003-0001>.

Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

The proposed consent order announced today settles the Commission's allegations that the proposed acquisition of SAGE Veterinary Partners, LLC ("SAGE") by JAB Consumer Partners SCA SICAR ("JAB"), the owner of Compassion-First Pet Hospitals and NVA Parent Inc. (collectively, "Compassion-First/NVA"), may substantially lessen competition for individual specialty veterinary services and emergency veterinary services in three local markets: (i) Austin, TX; (ii) in and around San Francisco, CA; and (iii) in and between Oakland, Berkeley, and Concord, CA. The proposed divestiture resolves all competitive overlaps between Compassion-First/NVA and SAGE in the alleged relevant markets.

Because it does so, we voted to accept this proposed consent order for public comment. But we write separately to object to the Complaint's invocation of rhetoric unrelated to competition and the order's apparent predication of remedies upon both that rhetoric and the majority's evident distaste for private equity as a business model, instead of the facts uncovered in the investigation.

The Complaint alleges a "growing trend towards consolidation in the emergency and specialty veterinary services markets across the United States in recent years by large chains".¹ That allegation, and Chair Khan's concurrently-released statement regarding private equity as a business model,² are the apparent bases for imposing broad prior approval and prior notice requirements on the parties.³ Even though we found competitive problems in just the three local markets discussed above, we are imposing prior approval requirements across California and Texas, and prior notice requirements

¹ Complaint, *In re JAB Consumer Partners SCA SICAR/SAGE Veterinary Partners, LLC*, File No. 2110140, paragraph 9 (June 2, 2022).

² Commissioners Bedoya and Slaughter join the Chair in her statement.

³ The parties are in the best position to evaluate whether the benefits of a transaction and the certainty of a consent order outweigh the costs. So, we do not necessarily oppose consents on the grounds that they include provisions that are unnecessary, overly broad, and counterproductive.

across the entire United States.

The “growing trend” allegation, in isolation, is not an appropriate basis for incremental remedies. *First*, our investigation revealed that the relevant competition occurs at the local level, driven by the distance and time that pet owners are willing to travel to obtain each relevant veterinary service. That is why the Complaint pleads local markets and the divestitures are designed to resolve overlaps in three specific local areas—two across the Bay Bridge from one another. For competition purposes, there is no national antitrust market for emergency and specialty veterinary services. To the extent there is consolidation on a national level, based on what the Commission pleads in the Complaint, it is irrelevant.⁴ It is also not inherently concerning. Our review of the evidence makes clear that the bulk of emergency and specialty veterinary clinics nationwide are independent, with larger “aggregators” like JAB and SAGE collectively controlling a minority of clinics. Post-acquisition, JAB will hold fewer than 100 clinics nationwide, a competitively meaningless share of the purported national market. *Cf. U.S. v. Von’s Grocery Co.* 384 U.S. 270 (1966). *Second*, we have seen no evidence that such a trend, if it exists, is bad for purposes of competition. That is, there are no discernible anticompetitive effects.

While untethered to any impact on competition, the allegation of the purported trend in nationwide consolidation appears to form the sole basis in the Complaint for imposing out-of-market prior approval and prior notice requirements. Chair Khan’s statement also argues that the fact that JAB is a private equity firm requires additional remediation, but neither the Complaint nor the Analysis of Agreement Containing Consent Orders to Aid Public Comment—nor, in our view, the evidence uncovered in the investigation—indicate any reason why this fact about JAB makes this or any other

⁴ Chair Khan’s statement argues that our critique here is belied by “market realities.” According to the Complaint and the Analysis of Agreement Containing Consent Orders to Aid Public Comment voted on by this Commission, however, the reality of competition in the markets in question is that it is local.

private equity transaction more likely to raise competition concerns.⁵ Imposing heightened legal obligations on disfavored groups – including private equity – because of who they *are* rather than what they have *done* raises rule of law concerns.

The parties are subject to statewide prior approval in Texas and California and nationwide prior notice. The Commission’s Prior Approval Policy Statement (“Prior Approval Policy”) contemplates that the Commission might impose a prior approval requirement that covers product or geographic markets beyond the relevant ones affected by the merger.⁶ Most of the bases for imposing out-of-market remedies are not met here—for example, if “the *relevant market alleged* is already concentrated or has seen significant consolidation in the previous ten years” (emphasis added).⁷ The Complaint does not allege that the three relevant geographic markets here have seen significant consolidation.

The Chair also justifies the broad prior approval provision because JAB previously acquired clinics and entered into a related consent order. In that prior matter, JAB approached the Commission with a proposed acquisition and worked with it to resolve competitive overlaps, small parts of a much larger transaction.⁸ That process enabled the FTC to ensure that overlapping assets were divested to an acceptable buyer,

⁵ Chair Khan’s statement points to buyouts by private equity firms that “saddle businesses with debt.” Public companies also sometimes choose to finance operations and acquisitions with debt. *See e.g.*, Frances Yoon, *The World’s Appetite for Debt Is Smashing Records*, Wall St. J. (Nov. 30, 2020), <https://www.wsj.com/articles/the-world-is-bingeing-on-debt-and-smashing-records-11606732203>. *See also* Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and The Theory of Investment*, 48 Am. Econ. Rev 261 (1958).

⁶ Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf (hereinafter “Prior Approval Policy”). *But see* Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

⁷ Prior Approval Policy, p. 2.

⁸ *See* Press Release, *FTC Requires Veterinary Service Providers Compassion First and National Veterinary Associates to Divest Assets in Three Local Markets* (Feb. 14, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-requires-veterinary-service-providers-compassion-first-national-veterinary-associates-divest> (The FTC required divestiture of 3 out of over 70 clinics operated by the parties).

which is critical to maintaining competition.⁹ The effect of imposing broader prior approval requirements because of such settlements will be to deter not mergers, but settlements. It will deter parties from submitting for agency review the complete set of assets subject to the deal, instead “fixing it first”: selling what they want to whom they want. The Commission has traditionally eschewed this approach because it reduces our ability to ensure the robustness of the divestiture and the quality of the buyer and because, without a consent order, there is no accountability should parties fail to meet their obligations. Fix-it-first transactions remove Commission oversight and increase the likelihood that competition will not be preserved and that consumers will be harmed.

As we warned when the Commission (actually, two sitting Commissioners and a zombie vote) issued the ill-advised Prior Approval Policy, the broad and subjective factors enunciated in that policy lack limiting principles and are almost certain to lead to the routine imposition of prior approval provisions on geographic and product markets beyond those at issue in any given merger. We acknowledge that there are cases where the evidence supports the imposition of these more onerous remedies.¹⁰ This does not appear to be one of those cases.

We encourage comments during the public comment period regarding the statewide prior approval and nationwide prior notice provisions that appear in today’s consent order. In addition, we encourage comments on the implications of the agency’s apparent shift to an approach that incentivizes fix-it-firsts.

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⁹ See e.g., *The FTC’s Merger Remedies 2006-2012: A Report of the Bureau of Competition and Economics* (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

¹⁰ Decision, *In re DaVita Inc./Total Rental Care, Inc.*, File No. 2110013 (Oct. 25, 2021) https://www.ftc.gov/system/files/documents/cases/davita_order_9_24_final.pdf (DaVita was subject to a statewide prior provision, requiring prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah.).